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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Gary S. Duarte,

10 Plaintiff,

11 v.

12 Catalina Foothills School District No. 16,

13 Defendant.

No. CV-12-00844-TUC-JAS

**ORDER**

14 Pending before the Court are the parties' motions in limine. For the reasons stated  
15 below, the motions are denied in part and granted in part.

16 **BACKGROUND**

17 Plaintiff, Gary S. Duarte, was employed as a maintenance worker for Defendant,  
18 Catalina Foothills School District No. 16 ("District"), for 34 years. His work included  
19 going on roofs of the District's buildings and making necessary repairs. According to  
20 Plaintiff, the District's Director of Facilities (Basil Callimanis-"Basil") told him in  
21 January of 2011 that his contract would not be renewed because Plaintiff was too old for  
22 the job. In contrast, Basil denies making such a statement; rather, his position is that  
23 Plaintiff's contract was not renewed due to poor work performance.

24 **STANDARD OF REVIEW**

25 As pertinent to the motions in limine, Fed. R. Evid. 402 provides: "Relevant  
26 evidence is admissible unless any of the following provides otherwise: • the United States  
27 Constitution; • a federal statute; • these rules; or • other rules prescribed by the Supreme  
28 Court. Irrelevant evidence is not admissible." Fed. R. Evid. 401 defines relevant

1 evidence as follows: "Evidence is relevant if: (a) it has any tendency to make a fact more  
2 or less probable than it would be without the evidence; and (b) the fact is of consequence  
3 in determining the action." Fed. R. Evid. 403 provides that: "The court may exclude  
4 relevant evidence if its probative value is substantially outweighed by a danger of one or  
5 more of the following: unfair prejudice, confusing the issues, misleading the jury, undue  
6 delay, wasting time, or needlessly presenting cumulative evidence."

## 7 **DISCUSSION**

### 8 **Doc. 64: The District's Motion in Limine No. 2 (Performance Reviews)**

9 The District moves to exclude written performance reviews that Plaintiff seeks to  
10 introduce at trial. The reviews Plaintiff intends to introduce include ratings that list  
11 Plaintiff's job performance as "exceeding" or "meets" job expectations or requirements.  
12 Defendant argues that these performance reviews are irrelevant and subject to exclusion  
13 under Rule 403 as they were not written by Basil who was the ultimate person that  
14 decided not to renew Plaintiff's contract. In contrast, as Plaintiff correctly argues, these  
15 performance reviews are highly relevant to whether Plaintiff was truly fired for  
16 performance, or based on his age. These written reviews were written by Plaintiff's direct  
17 supervisor since at least 2004 (Charles "Chuck" Kennedy-"Kennedy"); if Plaintiff's  
18 direct supervisor consistently rated Plaintiff's work as "exceeding" or "meeting" job  
19 expectations or requirements, such evidence tends to undermine the District's claim that  
20 Plaintiff was fired for poor performance. The relevance of this evidence outweighs any  
21 Rule 403 considerations. Defendant's motion in limine regarding performance reviews  
22 (Doc. 64) is denied.

### 23 **Doc. 62: Plaintiff's Motion In Limine Regarding Plaintiff's Replacement**

24 Plaintiff moves to exclude evidence that Defendant seeks to introduce regarding  
25 the person hired to replace Plaintiff. Plaintiff argues that information regarding who  
26 replaced Plaintiff after Plaintiff's was fired is irrelevant to whether Plaintiff was fired  
27 based on his age, and any relevance is outweighed by Rule 403 considerations. The  
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1 Court disagrees. As Defendant argues, in relation to the Age Discrimination claim,  
2 Plaintiff's Complaint alleges that the District replaced Plaintiff with a substantially  
3 younger employee. In addition, part of Plaintiff's Age Discrimination claim includes a  
4 requirement to show that Plaintiff was part of the protected class covered by the statute  
5 (i.e., he was age 40 or older when the adverse employment action occurred). However,  
6 the record reflects that the District hired a replacement who was 52 (i.e., only 6 years  
7 younger than Plaintiff when he was fired-58), and that Plaintiff's replacement was also  
8 part of the protected class under the applicable statute (i.e., age 40 or older). This  
9 evidence tends to prove that the District did not fire Plaintiff due to a discriminatory  
10 motive, and the relevance of the evidence outweighs any Rule 403 considerations.  
11 Plaintiff's motion regarding his replacement (Doc. 62) is denied.

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15 **Doc. 61: Plaintiff's Motion In Limine Regarding Reference to a Dismissed Claim**

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17 Plaintiff moves to preclude any reference to the dismissed claim in this case. The  
18 record reflects that the Complaint originally included a claim for both Age  
19 Discrimination and National Origin Discrimination. However, after Plaintiff had an  
20 opportunity to conduct discovery in this case, Plaintiff voluntarily agreed to dismiss the  
21 Nation Origin Discrimination claim; as such, the parties submitted a stipulation to  
22 dismiss this claim, and U.S. District Judge Zipps issued an Order granting the stipulation  
23 to dismiss this claim. In light of these circumstances, Plaintiff argues that allowing any  
24 reference to this dismissed claim is irrelevant, and any relevance is outweighed by Rule  
25 403 considerations. In contrast, the District argues that reference to the dismissed claim  
26 is relevant to Plaintiff's credibility. The District argues that Plaintiff previously  
27 submitted official documents to the Arizona Civil Rights Division ("ACRD") and this  
28 Court (i.e., the Complaint) attesting that the District fired him because he is Hispanic, but

the facts proved otherwise which led to Plaintiff's voluntary dismissal of the claim. The Court agrees with Plaintiff's position. As the National Origin Discrimination claim has been dismissed, the Court finds that any continued reference to that dismissed claim is irrelevant to the one remaining claim in this case (i.e., Age Discrimination). In addition, to the extent it could be marginally relevant to Plaintiff's credibility, the Court finds that any reference to this dismissed claim at trial is outweighed by Rule 403 considerations. Therefore, Plaintiff's motion pertaining to any reference to the dismissed claim (Doc. 61) is granted.<sup>1</sup>

**Doc. 63: Defendant's Motion In Limine No. 1 (Hearsay Statements)**

As referenced above, Charles "Chuck" Kennedy was Plaintiff's direct supervisor, and wrote his employee reviews since approximately 2004; the reviews rated Plaintiff's work as "exceeding" or "meeting" job expectations or requirements. Plaintiff seeks to testify at trial that Kennedy told him that Basil was not going to renew Plaintiff's contract because the Plaintiff was too old. Defendant argues that any such testimony is hearsay, and the hearsay exception for party admissions does not apply to each level of hearsay. Defendant argues that Basil, and not Kennedy, was solely responsible for firing Plaintiff, and therefore any statement regarding any decision to fire Plaintiff was not within the scope of Kennedy's employment such that the party admission exception does not apply.<sup>2</sup> The Court disagrees.

As Plaintiff correctly argues, the Basil to Kennedy and Kennedy to Plaintiff statements are not considered hearsay under Fed. R. Evid. 801(d)(2)(D) because they are statements "offered against an opposing party and ...[were] made by the party's agent or

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<sup>1</sup> Defendant correctly points out that there are certain documents that it seeks to introduce that do not reference the dismissed claim. For example, the ACRD's dismissal of Plaintiff's charge of discrimination does not reference the National Origin claim, but simply dismisses the entire charge without reference to any specific claim. The Court agrees that this is outside the scope of Plaintiff's motion and may be admitted. However, to the extent there are any underlying documents that reference the dismissed claim at issue, any references whatsoever to National Origin Discrimination shall be redacted.

<sup>2</sup> Plaintiff does not oppose the portion of Defendant's motion seeking to exclude hearsay statements pertaining to Eileen Ruddell; as such, this part of Defendant's motion is granted.

1 employee on a matter within the scope of that relationship and while it existed . . . ”<sup>3</sup>  
2 Kennedy and Basil were both employees of the District at the time the statements were  
3 made. Basil was Kennedy’s supervisor, and Kennedy was Plaintiff’s direct supervisor.  
4 Basil’s statement to Kennedy was within the scope of that relationship; Basil (the  
5 Facilities Director) was informing Plaintiff’s direct supervisor that Plaintiff’s contract  
6 would not be renewed. This was a decision in which Kennedy would be associated with  
7 as it involved an employee under his direct supervision.

8 Likewise, Kennedy’s statement to Plaintiff regarding Basil’s statement was within  
9 the scope of Kennedy’s employment relationship with the District. Kennedy was  
10 Plaintiff’s direct supervisor who managed Plaintiff’s daily work and work assignments.  
11 Consequently, Basil would logically keep Kennedy abreast of any matters pertaining to  
12 employees under Kennedy’s direct supervision, and Kennedy would inform Plaintiff  
13 about issues directly impacting Plaintiff’s future employment with the District. *See*  
14 *McDonough v. City of Quincy*, 452 F.3d 8, 21 (1<sup>st</sup> Cir. 2006)(statements related to  
15 personnel action against the plaintiff, made by department officials involved in personnel  
16 management, were within the scope of their employment and properly admitted under the  
17 party admission exception; emphasizing that for “a statement to be an admission under  
18 Fed.R.Evid. 801(d)(2)(D), it must be made by a party, a party's agent, or a servant within  
19 the scope of an agency or employment . . . The employee's station within the organization  
20 is not relevant to the Rule 801(d)(2) analysis . . . The relevant inquiry is whether the  
21 employee's statement was made within the scope of employment.”); *see also Woodman v.*  
22 *Haemonetics Corp.*, 51 F.3d 1087, 1093–94 (1st Cir.1995)(rejecting the argument that  
23 statements made by a “first-line supervisor” with no firing authority could not be  
24 admissions under Rule 801(d)(2)(D)). The Court finds that the statement at issue is a  
25 party admission, and that it is relevant inasmuch as it tends to bolster Plaintiff’s position

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26 <sup>3</sup> *See also* Fed. R. Evid. 805 (“Hearsay within hearsay is not excluded by the rule against  
27 hearsay if each part of the combined statements conforms with an exception to the rule.”).  
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1 that he was fired based on age, and not based on performance as alleged by Basil. In  
2 addition, the relevance of this evidence outweighs any Rule 403 considerations. As such,  
3 Defendant's motion in limine regarding statements by Kennedy (Doc. 63) is denied.

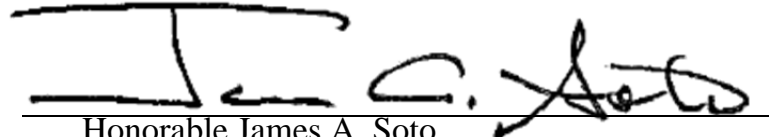
4 **CONCLUSION**

5 Accordingly, IT IS HEREBY ORDERED as follows:

6 (1) The parties' motions in limine (Docs. 61, 62, 63, 64) are denied in part and granted in  
7 part as discussed in the text of this Order.

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9 Dated this 10th day of October, 2014.

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Honorable James A. Soto  
United States District Judge